
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 98-10316

UNITED STATES OF AMERICA,

Appellant,

v.

TUCOR INTERNATIONAL, INC., ET AL.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	4
A. It Makes No Sense That Congress Would Give Foreign Truckers A License To Gouge U.S. Consumers	4
B. The Shipping Act Exemption From the Antitrust Laws Is Limited to Ocean Common Carrier and Marine Terminal Agreements	6
1. The Language and Structure of the Shipping Act	6
2. The Defendants' Objections to That Reading Are Unpersuasive	9
3. The Legislative History Supports the Government's Interpretation ...	20
4. The Policy of the Shipping Act	25
C. The Indictment Is Not Limited to Shipments Within Exemption (4)	28
D. The Rule of Lenity Is Not an Independent Ground for Dismissal of the Complaint	30
CONCLUSION	32
Addendum A - Excerpts from Transpacific Westbound Rate Agreement	
Addendum B - Excerpts from Asia North America Eastbound Rate Agreement	
Addendum C - Stark, Charles S., "A View of Current International Antitrust Issues" (May 20, 1982)	
Addendum D - Affidavit of Dr. Pacifico Agabin	

TABLE OF AUTHORITIES

Cases:

<i>Bailey v. United States</i> , 516 U.S. 137 (1995)	7
<i>Beecham v. United States</i> , 511 U.S. 368 (1994)	3
<i>Bell Atlantic Tel. Cos. v. FCC</i> , 131 F.3d 1044 (D.C. Cir. 1997)	7
<i>Chapman v. United States</i> , 500 U.S. 453 (1991)	31
<i>FMC v. Seatrain Lines, Inc.</i> , 411 U.S. 726 (1973)	2, 8
<i>Interpool Ltd. v. FMC</i> , 663 F.2d 142 (D.C. Cir. 1980)	17
<i>Kawasaki Kisen Kaisha, Ltd. v. FMC</i> , No. 97-1194 (D.C. Cir. filed Mar. 28, 1997)	9
<i>Leisnoi, Inc. v. Stratman</i> , 154 F.3d 1062 (9 th Cir. 1998)	7
<i>National Ass'n of Recycling Industries v. American Mail Line</i> , 720 F.2d 618 (9 th Cir. 1983), cert. denied, 465 U.S. 1109 (1984)	17, 18
<i>Northwest Forest Resource Council v. Glickman</i> , 82 F.3d 825 (9 th Cir. 1996)	4, 20
<i>O'Connor v. United States</i> , 479 U.S. 27 (1986)	7, 19
<i>Pacific Seafarers, Inc. v. Pacific Far East Line</i> , 404 F.2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969)	12, 19
<i>Southwestern Bell Tel. Co. v. FCC</i> , 19 F.3d 1475 (D.C. Cir. 1994)	11
<i>Transpacific Westbound Rate Agreement v. FMC</i> , 951 F.2d 950 (9 th Cir. 1991)	2, 4, 9-13, 15
<i>United States v. Huteson</i> , 312 U.S. 219 (1941)	13

<i>United States v. Nippon Paper Industries Co.</i> , 109 F.3d 1 (1 st Cir. 1997), cert. denied, 118 S.Ct. 685 (1998)	31
<i>United States v. Terrence</i> , 132 F.3d 1287 (9 th Cir. 1997)	31
<i>United States v. Union Pac. R.R.</i> , 353 U.S. 112 (1957)	13

Agency Decisions:

<i>Foreign-to-Foreign Agreements--Exemptions</i> , 25 S.R.R. 455 (1989), denying recon. of 24 S.R.R. 1448 (1988), petition for review denied, <i>Transpacific Westbound Rate Agreement v. FMC</i> , 951 F.2d 950 (9 th Cir. 1991)	11, 13, 24
<i>Port Restrictions & Requirements in the United States/Japan Trade</i> , 62 Fed. Reg. 9696 (Mar. 4, 1997)	9
<i>Port Restrictions & Requirements in the United States/Japan Trade</i> , 62 Fed. Reg. 61648 (Nov. 19, 1997)	9

Statutes:

<i>Webb-Pomerene Act</i> , 15 U.S.C. 61-65	25
<i>Export Trading Company Act</i> , 15 U.S.C. 4011-4021	25
<i>Shipping Act</i> , 1916, former 46 U.S.C. 801 <i>et seq.</i>	2, 8, 17
section 15, 46 U.S.C. 801 (1982)	12, 17
<i>Merchant Marine Act</i> , 1920, section 19(b)(1), 46 U.S.C. app. 876(1)(b)	9

Shipping Act of 1984, 46 U.S.C. app. 1701 <i>et seq.</i>	2, 5, 6, 12, 19, 20, 28
section 3(26), 46 U.S.C. app. 1702(26)	14
Section 3(6), 46 U.S.C. app. 1702(6)	14
section 4, 46 U.S.C. app. 1703	3, 7, 8, 10, 12, 15, 16, 19, 20, 23
sections 4-7, 46 U.S.C. app. 1704-1706	6, 8
section 4(a), 46 U.S.C. app. 1703(a)	16, 17
section 4(b), 46 U.S.C. app. 1703(b)	16, 17
section 4(c), 46 U.S.C. app. 1703(c)	8
section 5, 46 U.S.C. app. 1704	8, 17, 19
section 5(a), 46 U.S.C. app. 1704(a)	8-12, 17
section 6, 46 U.S.C. app. 1705	8, 17, 19
section 7, 46 U.S.C. 1706	3, 20, 21, 23
section 7(a), 46 U.S.C. app. 1706(a)	20
sections 7(a)(1)-(2), 46 U.S.C. app. 1706(a)(1)-(2)	8, 14, 20
section 7(a)(2), 46 U.S.C. app. 1706(a)(2) (“exemption (2)”)	17, 18
sections 7(a)(2)-(5), 46 U.S.C. app. 1706(a)(2)-(5) (“exemptions (2)-(5)”)	16
section 7(a)(3), 46 U.S.C. app. 1706(a)(3) (“exemption (3)”)	9-11, 13, 19, 20
section 7(a)(4), 46 U.S.C. app. 1706(a)(4) (“exemption (4)”)	2, 3, 7, 9, 13-16, 19, 22, 25, 28, 31

(Shipping Act of 1984 - continued)

section 7(a)(5), 46 U.S.C. app. 1706(a)(5) (“exemption (5)”)	9
section 7(b)(2), 46 U.S.C. app. 1706(b)(2)	14
section 7(b)(3), 46 U.S.C. app. 1706(b)(3)	9
sections 7(a)(3)-(5), 46 U.S.C. app. 1706(a)(3)-(5) (“exemptions (3)-(5)”)	8, 9, 18, 19
section 16, 46 U.S.C. app. 1715	18
Interstate Commerce Act, former 49 U.S.C. 10901 <i>et seq.</i> (1994)	5
49 U.S.C. 10706(b) (1994)	5
49 U.S.C. 10708 (1994)	5
ICC Termination Act, 49 U.S.C. 10101 <i>et seq.</i>	4
49 U.S.C. 13703(a)	5
49 U.S.C. 41309	5, 20

Legislative Materials:

H.R. Conf. Rep. No. 98-600 (1984)	3
H.R. Rep. No. 97-611, pt. 1 (1982) (Merchant Marine Committee)	22
H.R. Rep. No. 97-611, pt. 2 (1982) (Judiciary Committee)	21, 22
H.R. Rep. No. 98-53, pt. 1 (1983) (Merchant Marine Committee)	18, 22
H.R. Rep. No. 98-53, pt. 2 (1983) (Judiciary Committee)	5, 9, 10, 20, 24

S. Rep. No. 98-3 (1983)	19
-------------------------------	----

Miscellaneous:

Stark, Charles S., "A View of Current International Antitrust Issues" (May 20, 1982)	26
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U.S. Dept. of Justice and FTC, <i>Antitrust Enforcement Guidelines for International Operations</i> (April 1995), http://www.usdoj.gov/atr/public/guidelines/internat.txt , 1995 WL 150725 (DOJ) (" <i>International Antitrust Guidelines</i> ")	25, 26
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INTRODUCTION AND SUMMARY OF ARGUMENT

The defendants made and carried out a price-fixing agreement whose purpose and effect were to force the United States government to pay supra-competitive prices to move U.S. servicemen's household goods between the United States and the Philippines. There is no dispute that as a general matter such conduct, though involving motor carriers located in the Philippines but targeting only the United

States, falls within the jurisdictional reach of the Sherman Act and merits criminal prosecution. There is also no dispute that this conduct is outside the regulatory power of the Federal Maritime Commission or any other U.S. regulatory agency. The only disputed question is whether Congress in section 7(a)(4) of the Shipping Act of 1984 nonetheless granted an immunity for this unregulated and otherwise unlawful conduct. The answer to this question is plainly “no.”

As we explained in our opening brief, the legal principles applicable to antitrust immunities are settled. First, exemptions from the antitrust laws are to be strictly construed. *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973) (construing 1916 Shipping Act). Second, it “is implausible that Congress would provide a mechanism for shipping interests to obtain antitrust immunity, but otherwise be insulated from any form of agency regulation.” *Transpacific Westbound Rate Agreement v. FMC*, 951 F.2d 950, 957 (9th Cir. 1991) (“*Transpacific*”). Yet in their brief, the defendants ignore *Seatrain*’s rule of strict construction. And their only response to the *Transpacific* principle of the implausibility of immunity in the absence of U.S. agency regulation—that Congress did the implausible in the interest of international comity—is unsupported by *Transpacific* or anything in the text or legislative history of the Shipping Act.

The defendants compound these errors by ignoring the universal principle of statutory construction that the text of a statute must be taken as a whole. *Beecham v. United States*, 511 U.S. 368, 372 (1994). Although they claim immunity for their price fixing agreement in the language of section 7(a)(4) of the Shipping Act, section 7(a)(4) does not stand alone. Rather, it is an integral part of the entire Act and thus subject to the earlier, limiting language of section 4, which is entitled “Agreements Within Scope of Act.” Section 4 clearly identifies those agreements: “agreements by or among ocean common carriers,” “among marine terminal operators,” and “among” marine terminal operators and ocean common carriers. The defendants concededly are not ocean common carriers or marine terminal operators, and thus their price-fixing agreements do not fall “within the scope of the Act.”

Indeed, it was precisely to underscore this linkage between sections 4 and 7 that the Conference Committee Report on the 1984 Act said: “This section [4] states the coverage of the bill. It lists the type of agreements to which the bill applies. When read in connection with sections 5 and 7, the effect is to remove the listed agreements from the reach of the antitrust laws as defined in the bill.” H.R. Conf. Rep. No. 98-600, at 28 (1984). The conference committee report is the most reliable part of legislative history, “because it ‘represents the final statement of the

terms agreed to by both houses.”” *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 835 (9th Cir. 1996) (internal citation omitted). The defendants completely ignore it, and it flatly refutes their position

ARGUMENT

A. It Makes No Sense That Congress Would Give Foreign Truckers A License To Gouge U.S. Consumers

This Court spoke both established law and common sense when it said that “it is implausible that Congress would provide a mechanism for shipping interests to obtain antitrust immunity, but otherwise be insulated from any form of agency regulation.” *Transpacific*, 951 F.2d at 957. Thus, while Congress gave antitrust immunity to ocean carrier conference ratemaking (see Tucor Br. at 2), it simultaneously protected U.S. shippers against unreasonable conference rates by the regulatory power of the Federal Maritime Commission. And it protected shippers against unreasonable domestic motor carrier rate bureau rates (Tucor Br. at 2) by the regulatory power of the Surface Transportation Board under the ICC Termination Act.¹ Yet the plain and painful meaning of defendants’ reading of the

¹ Under the ICC Termination Act of 1995, motor carriers’ rate agreements may be implemented only after they have been filed and approved by the Surface
(continued...)

Shipping Act is that Congress chose to deny U.S. shippers protection under either the antitrust laws or the Shipping Act against conspiratorial price gouging like the defendants'.

The defendants are at a loss to explain why Congress would do something so harmful to its constituency, U.S. consumers and businesses. Their only effort in this regard is the assertion that Congress did this as an exercise in international comity (Tucor Br. 8-9, 17, 31). But they adduce not an iota of evidence to support that highly implausible proposition with respect to the Shipping Act. On the contrary, Congress specifically amended exemption (3) to reject any general antitrust immunity for agreements regarding transportation within foreign countries where they have a direct effect on U.S. commerce—as the defendants' agreement does. Congress instead chose to rely on the case-by-case application of standards of comity under the antitrust laws. H.R. Rep. No. 98-53, pt. 2, at 32-33 (1983).

¹ (...continued)

Transportation Board as being in the public interest, they are subject to each member's right of independent action, and the Board may review any rates established under them. 49 U.S.C. 13703(a)(2), (4), and (5)(A). The codified version of the Interstate Commerce Act in effect at the time of the conspiracy alleged in the indictment imposed similar conditions. Former 49 U.S.C. 10706(b), 10708. Agreements among air carriers are similarly subject to filing and prior review requirements. 49 U.S.C. 41309.

Moreover, the defendants' claim to antitrust immunity rests entirely on the fortuity of whether or not a particular set of shipments was sent under "through transportation"—a matter utterly irrelevant to comity concerns. Finally, defendants' immunity claim passes from the improbable to the bizarre when they suggest (Br. 17) that Congress meant for victimized U.S. shippers to seek their remedy under Philippine antitrust law, to which defendants' own expert said Philippine authorities themselves are "indifferent."²

Rather, as we shall now explain, both the text and the legislative history of the Shipping Act show that Congress intended to make the antitrust laws applicable to defendants' conduct.

B. The Shipping Act Exemption From the Antitrust Laws Is Limited to Ocean Common Carrier and Marine Terminal Agreements

1. The Language and Structure of the Shipping Act

Four consecutive and interrelated sections of the Shipping Act address the subject of agreements. Sections 4-7, 46 U.S.C. app. 1704-1706. The defendants

² Affidavit of Dr. Pacifico Agabin, ¶5, Exhibit 10 to Luzon Memorandum in Support of Motion to Dismiss, Docket Item 92 (attached as Addendum D to this Brief).

start their analysis of the Act (Br. 12) in the middle of the last section, which grants an exemption for “any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade.” Section 7(a)(4), 46 U.S.C. app. 1706(a)(4) (“exemption (4)”). But as this Court recently said: “because words can have alternative meanings depending on context, we interpret statutes, not by viewing individual words in isolation, but rather by ‘reading the relevant statutory provisions as a whole.’” *Leisnoi, Inc. v. Stratman*, 154 F.3d 1062, 1066 (9th Cir. 1998) (internal citation omitted). Accord, *Bailey v. United States*, 516 U.S. 137, 145 (1995). That rule applies even in construing the term “any.” *O’Connor v. United States*, 479 U.S. 27, 29-31 (1986) (in light of context, “any taxes” held to refer only to taxes in the Republic of Panama); *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (“textual analysis is a language game played on a field known as ‘context’”); *id.* at 1049 (“any *** interLATA services” meant only those BOCs were “otherwise authorized to provide”).

In this case, the context of exemption (4) is provided by the preceding sections of the Shipping Act. Section 4 provides that the Act applies to “agreements by or among ocean common carriers” and agreements “among marine terminal

operators and among one or more marine terminal operators and one or more ocean common carriers.” 46 U.S.C. app. 1703.³ Section 5(a) then provides that most such agreements are to be filed with the FMC; section 6 provides for the regulation of the filed agreements; and sections 7(a)(1)-(2) grant antitrust immunity for agreements filed and regulated under sections 5 and 6 and for activities colorably within the scope of such filed agreements.

Section 5(a), however, does not require the filing of all agreements. It excepts, *inter alia*, “agreements related to transportation to be performed within or between foreign countries.” Those agreements are not subject to regulation under section 6 or to the antitrust exemptions in section 7(a)(1)-(2). In this context, the natural reading of sections 7(a)(3)-(5), all of which provide antitrust immunity for

³ Defendants (Br. 24) make much of the fact that section 4(c), 46 U.S.C. app. 1703(c), excludes acquisitions from the scope of the Act. That provision merely codifies the earlier decision in *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973), that merger and acquisition agreements among ocean common carriers were not within the scope of the Shipping Act, 1916, former 46 U.S.C. 801.

They also suggest (Br. 24-27) that limiting sections 4-7 to the agreements specified in section 4 would be inconsistent with the coverage of other entities in other provisions of the Act. That is wrong. The coverage of sections 4-7 is written in terms of agreements and the other provisions in terms of entities, and there is no inconsistency in reading each as written.

agreements regarding transportation services performed outside the United States,⁴ is to apply them to agreements excepted from filing by section 5(a).

2. The Defendants' Objections to That Reading Are Unpersuasive.

a. The defendants' primary argument is that exemptions (3)-(5) are not limited to agreements excepted from filing by section 5(a) (Br. 37-38). They attempt to prove this by arguing that under *Transpacific* exemption (3) "cannot apply to 'ocean common carriers'" (Br. 27). But that argument proves far too much, and is not supported by either *Transpacific* or the text of the statute.

⁴ Section 7(a)(3) refers to "transportation services within or between foreign countries," section 7(a)(4) to "the foreign inland segment of through transportation," and section 7(a)(5) to terminal facilities "outside the United States."

Contrary to defendants' suggestion (Br. 14 n.13; Br. 17), exemption (5) is limited to ocean common carrier agreements. As Congress recognized in section 7(b)(3), ocean carriers do enter into agreements among themselves to operate terminal facilities. See H.R. Rep. 98-53, pt.2, at 33 (1983). Moreover, the United States does not automatically extend comity to terminal practices that discriminate against United States interests. See *Port Restrictions & Requirements in the United States/Japan Trade*, 62 Fed. Reg. 9696 (Mar. 4, 1997) (rule imposing fees on Japanese carriers under 46 U.S.C. app. 876(1)(b) in light of discrimination against U.S.-flag carriers in Japanese ports), pet. for review pending *sub nom. Kawasaki Kisen Kaisha, Ltd. v. FMC*, No. 97-1194 (D.C. Cir. filed Mar. 28, 1997). The rule was suspended after the Japanese government agreed to take remedial steps. 62 Fed. Reg. 61648 (Nov. 19, 1997).

Under the defendants' reasoning, the foreign-to-foreign filing exception in section 5(a) as well as exemption (3) would be inapplicable to ocean common carrier agreements. As this Court recognized in *Transpacific, supra* at 954, however, section 5(a) explicitly refers back to section 4 as defining the universe of agreements to which the Act applies. It then carves out a subset of such agreements, those "related to transportation within and between foreign countries," that are not to be filed with the FMC. The only possible explanation for the latter provision is that Congress considered ocean common carriers capable of entering into agreements regarding transportation between foreign countries. Congress also expressly linked the foreign-to-foreign filing exception in section 5(a) and exemption (3). In fact, as the House Judiciary Committee explained, it added the limiting language of the "unless" clause to exemption (3) in order to preserve an antitrust remedy for "agreements involving transportation between two foreign countries" precisely because those agreements "need not be filed under this Act," citing the provision of the bill that became section 5(a). H.R. Rep. 98-53, pt. 2, at 32-33 (1983). Similarly, the FMC discussion of the legislative history on which the

defendants rely (Br. 36-37, 39) refers to exemption (3) as “the companion to Section 5(a)’s filing exception.”⁵

The defendants also misread the Court’s holding in *Transpacific* (as well as the FMC’s underlying decisions and the government’s briefs in support of that position, Tucor Br. 35, 39). The question in *Transpacific* was whether the Shipping Act covered rate agreements regarding intermodal shipments to the United States via Canadian ports. The only parties to the agreements were vessel operating ocean carriers that served the trades between the Far East and ports in the United States and Canada. The FMC held that the carriers could not file through rate agreements for the shipments, because in serving Canadian ports they were not acting in the capacity of “ocean common carriers” within the meaning of the Act, and this Court affirmed that decision. The statutory ambiguity arose only because “one can be a common carrier with regard to some activities but not others.” *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).⁶ *Transpacific*, therefore,

⁵ *Foreign-to-Foreign Agreements--Exemptions*, 25 S.R.R. 455, 464 (1989), denying recon. of 24 S.R.R. 1448 (1988), petition for review denied, *Transpacific*, *supra*.

⁶ Quoting *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976).

provides no support for granting immunity to an entity that was not an ocean common carrier with respect to at least some of its activities. Indeed, it would be incongruous to use *Transpacific* as precedent for granting immunity to unfilled agreements among parties that have no claim whatever to be ocean common carriers.

To be sure, under *Transpacific*, agreements regarding transportation between foreign countries would not have to be filed even in the absence of the section 5(a) exception clause. But that does not make it meaningless. At the time Congress wrote the 1984 Act, a court had indicated that it might construe the jurisdictional language used in section 4, which had been largely taken from section 15 of the 1916 Act, as requiring ocean common carriers to file at least some agreements regarding foreign-to-foreign trades. See *Pacific Seafarers, Inc. v. Pacific Far East Line*, 404 F.2d 804, 810 & n.16 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969). Congress adopted the “except foreign-to-foreign” clause in section 5(a) to make clear what result it wanted in that situation. In doing so it pragmatically dealt with the vast majority of cases to which the law applies even if it left some ambiguities, such as the one this Court had to address in *Transpacific*.

Exemption (3) needs to be addressed in the same pragmatic fashion. As explained in the government's main brief (U.S. Br. 27-28), Congress intended it to cover agreements of entities that engage in ocean common carriage, particularly agreements regarding landbridge services that cross the United States and transshipment operations that use United States ports. It may be that such agreements are not "agreements by or among ocean common carriers" as this Court subsequently construed that phrase in *Transpacific* because the carriers are not acting in their "ocean common carrier" capacity under them,⁷ but that is no reason to ignore the obvious will of Congress either by an excessively narrow construction (which would exclude agreements on landbridge rates), or by an excessively broad one (covering agreements among entities that are in no sense ocean common carriers). Cf. *United States v. Union Pac. R.R.*, 353 U.S. 112, 117-18 (1957); *United States v. Hutcheson*, 312 U.S. 219, 235 (1941).

b. The defendants' other major argument is that ocean common carriers cannot be the intended beneficiaries of exemption (4) because they do not engage in the inland transportation to which exemption (4) is addressed, and because any

⁷ See *Foreign-to-Foreign Agreements--Exemptions*, *supra*, 25 S.R.R. at 464 n.14.

agreements regarding the through transportation in which they do participate are necessarily covered by exemptions (1)-(2) (Br. 16, 20-22, 24, 29-31). It is irrelevant, however, whether ocean common carriers provide the inland segment of through transportation with their own equipment. When an ocean carrier conference publishes a through intermodal rate its members assume legal responsibility for the through transportation, including any foreign inland segments,⁸ even if they subcontract the physical carriage to independent rail or motor carriers. Moreover, since exemption (4) is not addressed to the carriage itself, but to agreements concerning the inland carriage, conference members who agreed on the inland division they would pay their connecting carriers, or agreed to boycott one such carrier, would plainly be entering into an agreement “concerning the inland segment” despite the fact that they were not providing the inland transportation.

⁸ Contrary to defendants’ suggestions (Br. 15, 30), the definition of “common carrier” under the Act includes “assum[ing] responsibility for the transportation from the port or point of receipt to the port or point of destination” without regard to whether one of those “points” is in a foreign country. Section 3(6), 46 U.S.C. app. 1702(6). Thus, so long as the other elements of the definition are met, common carriage under the Act would include responsibility for the foreign inland segment of through transportation. Section 3(26), 46 U.S.C. app. 1702(26). The Shipping Act nevertheless draws a very clear distinction between agreements regarding the overall through transportation and agreements regarding the inland segments. See, *e.g.*, section 7(b)(2), 46 U.S.C. app. 1706(b)(2).

The defendants also assert (Br. 31) that the FMC has a practice of accepting for filing agreements “concerning foreign inland transportation and wharfage” that would be outside its jurisdiction under the government’s theory, and thus excluded from filing under *Transpacific*, *supra* at 957. In fact, the agreements merely include “the inland portion of through rates” and “wharfage” among the laundry list of topics on which the members can agree without specifying whether the services are foreign or domestic.⁹ Moreover, unlike the situation in the *Transpacific* case, it makes no difference, since ocean carrier agreements on the foreign inland segments of through transportation are immunized from the antitrust laws under exemption (4) even without filing.

c. The defendants argue that the antitrust exemptions should be given a broad construction because “[t]he word ‘only’ nowhere appears in section 4’s introductory language” (Br 23-24). They do not say where the word should appear, however. Congress could not have said that the Act applies “only” to agreements of ocean

⁹ Transpacific Westbound Rate Agreement, FMC Agreement No. 202-010689, section 5(a)(i) (5th ed., 1st Rev. p. 3, eff. Apr. 5, 1997); Asia North America Eastbound Rate Agreement, FMC Agreement No. 202-010776-050, section 5.1(a) (p. 3a, eff. 12-11-89). Relevant excerpts are attached as Addenda A and B to this Brief.

common carriers in section 4(a), because it does not; it also applies to agreements among marine terminal operators under section 4(b), and vice versa. Nor, contrary to defendants' suggestion (Br. 24), was Congress required to add an endless list of the entities and activities to which the Act did not apply. It was entitled to rely on the common sense notion that when it said it was giving an antitrust exemption to agreements of ocean common carriers and marine terminal operators, it was not giving an exemption to everyone's agreements. Indeed, defendants themselves illustrate the fallacy in their argument when they point out that construing exemption (4) as applying to everyone's through transportation agreements would also cover arrangements by non-vessel operating common carriers ("NVOs") (Br. 26). It is highly unlikely that Congress, after carefully excluding NVO agreements from coverage under section 4, intended to exempt them by the back door under exemption (4).

The defendants also note (Br. 12) that exemptions (2)-(5) cover "activities" as well as "agreements," and argue from this that the exemptions must reach beyond the agreements named in section 4. The reason for adding the term "activities," however, is that most agreements subject to section 4 are not self-executing, and contemplate further concerted action on the part of the participants that could in

itself constitute an independent antitrust violation. A conference agreement, for example, does not fix specific rates, but the members commit themselves to agree upon specific rates in the future. It was such implementing steps that this Court recognized as “activities conducted pursuant to approved agreements” under the 1916 Act,¹⁰ *National Ass’n of Recycling Industries v. American Mail Line*, 720 F.2d 618, 619 (9th Cir. 1983), cert. denied, 465 U.S. 1109 (1984). They did not require separate approval so long as they “restrict competition in a manner which can be reasonably inferred from the original conference agreement already approved by the Commission.” *Interpool Ltd. v. FMC*, 663 F.2d 142, 148 (D.C. Cir. 1980). The same usage is apparent in the 1984 Act, both in section 5(a)’s requirement that agreements “entered into with respect to an activity described in section 4(a) or (b)” be filed, and in exemption (2), which covers “any activity or agreement within the scope of this Act” undertaken with a reasonable basis to conclude that it was pursuant to an agreement on file and in effect under sections 5 and 6. Thus, when

¹⁰ Section 15 of the Shipping Act, 1916, former 46 U.S.C. 814, required prior approval by the FMC before a covered agreement could be implemented and became exempt from the antitrust laws.

viewed in context, the use of the term “activity” in exemptions (3)-(5) plainly does not expand the types of entities entitled to antitrust immunity.

It also does not advance the defendants’ argument to note (Br. 24) that exemption (2) is explicitly limited to activities and agreements “within the scope of this Act,” while no such limitation appears in exemptions (3)-(5). As explained in our main brief (p. 45 & n.30), exemption (2) embodies a compromise between members of Congress who favored a “blanket” immunity for ocean common carrier agreements and those who insisted that only filed agreements be immunized. In that context, the “within the scope of this Act” phrase is merely a prelude to the following clause, “whether permitted under or prohibited by this Act.”¹¹ Its purpose is to preclude arguments such as those made by shippers in *National Ass’n of Recycling Industries v. American Mail Line*, *supra* at 620, that ocean carrier activities under a filed and effective agreement may be held non-exempt solely because they violate some other provision of the Act. H.R. Rep. No. 98-53, pt. 1, at

¹¹ Exemption (2) covers “any activity or agreement within the scope of this Act, whether permitted under or prohibited by this Act, undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the Commission and in effect when the activity took place, or (B) it is exempt under section 16 of this Act [46 U.S.C. app. 1715] from any filing requirement of this Act.” 46 U.S.C. app. 1706(a)(2).

12 (1983) (Merchant Marine and Fisheries Committee). The provision does not leave persons affected by a violation without remedy—as does defendants’ reading of exemption(4)—but simply eliminates dual regulation under both the Shipping Act and the antitrust laws. So long as an activity is “within the scope” of the Act and the underlying agreement has been subjected to the requirements of sections 5 and 6, only the remedies and penalties of the Act itself will apply. S. Rep. No. 98-3, at 29 (1983).

On the other hand, unless the limitations of section 4 are assumed, even though not repeated, exemptions (3)-(5) “take[] on a meaning that is utterly implausible and has no foundation” in the legislative history. See *O’Connor v. United States*, *supra*, 479 U.S. at 31. Exemption (3), for example, which immunizes “any agreement or activity that relates to transportation services within or between foreign countries,” would be absurdly broad in its initial coverage, extending to entities and activities with no relationship at all to the United States or even to maritime commerce.¹²

¹² For example, if two U.S.-flag airlines engaged in concerted predatory practices to drive a third U.S.-flag airline out of business on a route between two foreign countries under the circumstances like those in *Pacific Seafarers, Inc. v.* (continued...)

3. The Legislative History Supports the Government's Interpretation.

The conference report and three committee reports regarding the 1984 Act (by the House Judiciary, House Merchant Marine and Fisheries, and Senate Commerce Committees) stated unequivocally that section 4 defines the scope of the immunity granted by section 7. See U.S. Br. 32-33. The defendants never mention the conference report, although it is both clear and authoritative. See *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 835 (9th Cir. 1996). The contention (Br. 44-46) that the committees were referring only to exemptions (1)-(2), based on some confusion in the text of a 1982 Judiciary Committee Report regarding subdivisions within section 7(a), is meritless. To begin, when the Committee discussed its changes in section 4, it said that it intended to “defin[e] the

¹² (...continued)

Pacific Far East Line, supra, 404 F.2d at 808-09, they would be engaged in an activity “that relates to transportation *** between foreign countries” under the defendants’ literal reading of exemption (3) standing by itself. The only bar to immunity would be the clause added by the Judiciary Committee to preserve antitrust remedies for conduct that substantially affects U.S. commerce. H.R. Rep. No. 98-53, pt. 2, at 32-33. Airlines, however, have their own carefully defined antitrust immunity that requires prior approval by the Secretary of Transportation, 49 U.S.C. 41309, and even without that clause it would be clear that Congress never contemplated granting them an additional one under the Shipping Act.

breadth of the antitrust exemption set forth in Section 7 of the bill”—all of section 7, not just some particular subsection or paragraph in it. H.R. Rep. No. 97-611, pt. 2, at 31 (1982). Thus, any subsequent confusion about subdivisions within section 7 was irrelevant to that discussion.

Moreover, defendants greatly inflate the supposed confusion. The passage they quote (Br. 44-45) from the Judiciary Committee Report (H.R. Rep. No. 97-611, pt. 2, at 32-33 (1982)) would be accurate and make perfect sense with the following changes (deletions struck through, additions in italics):

The Committee amendment makes major changes in this Section. Subsection (a) defines the scope of the full immunity conferred by the bill. That immunity extends under paragraph ~~(a)~~ *(1)* to any agreement that has become effective under Section 5 [section 6 as enacted], or is exempt from any requirement of the Act pursuant to Section 16 [46 U.S.C. app. 1715].

~~Subsection (b)~~ *Paragraph (2)* provides the same immunity for any conduct that is undertaken in the reasonable belief that it is pursuant to an effective agreement or that it is exempt from any filing requirement pursuant to Section 16.

The intent of these provisions is to confer antitrust immunity only on agreements and conduct properly submitted to the regulatory process of the Act. ~~Subsection (a)~~ *Paragraph (2)* confers no immunity on secret or covert conduct ***.

Paragraphs (3) through (7) of subsection (a) correspond to paragraphs (2), (4) through (6), and (8) of the bill as reported by the Merchant Marine Committee. ***

The passage thus starts with the entirely accurate observation that subsection (a) “defines the scope of the full immunity conferred by the bill” (there is no other provision in the bill granting immunity), and then describes each paragraph within the subsection. It gives special attention to paragraph (2), because that is where it primarily differed from the Merchant Marine Committee bill, which would have immunized unfilled agreements. Nor does the final reference to paragraphs (3)-(7)¹³ as deriving from the Merchant Marine Committee bill have any substantive significance, since in the next session of Congress, after adopting the Judiciary Committee version of section 4, the Merchant Marine Committee also affirmed (H.R. Rep. No. 98-53, pt. 1, at 29 (1983)):

¹³ As defendants note (Tucor Br. 44 n. 32), the Judiciary Committee omitted exemption (4) from its version of the bill, although it had been in the Merchant Marine Committee version as section 7(a)(7). On the other hand, the version of exemption (3) in those bills included all agreements regarding transportation within and between foreign countries without qualification, so a separate exemption for the foreign inland leg of through transportation would have been superfluous. Compare H.R. Rep. No. 97-611, pt. 1, at 5-6 (1982); with H.R. Rep. No. 97-611, pt. 2, at 6. The Merchant Marine Committee bill in the following Congress likewise omitted exemption (4), and it was added back on the floor only after the Judiciary Committee had inserted the “unless” clause in exemption (3) (U.S. Br. 47-48).

This section states the coverage of the bill. It lists the type of agreements to which the bill applies. When read in connection with sections [5] and 7, the effect is to remove the listed agreements from the reach of the antitrust laws as defined in the bill.

Thus, the Merchant Marine Committee agreed with the Judiciary Committee that section 4 defined the scope of covered agreements for all of section 7.

Finally, even if the testimony of a single witness three years before enactment of a bill could be taken as strong evidence of the intent of Congress (but see U.S. Br. 41 n. 26), the defendants' contention (Br. 46-47) that CENSA, a shipowners' organization, was lobbying for an antitrust exemption for independent inland carriers' cartels is contrary to the CENSA testimony. Dr. De la Trobe, the CENSA witness, specifically said that their concern was with "arrangements by conferences or ocean carriers" for inland transportation connected with intermodal services, and that "all we are seeking here is a right for conferences to set through rates." See U.S. Br. 37-38. Even while accusing the government of "selectively quot[ing] language from the legislative history" (Tucor Br. 43), the defendants cite nothing that would negate those statements.

Moreover, the defendants' theory does not make economic sense. The exemption in question applies only to through transportation, and to the extent the

ocean carrier rate associations themselves have market power, they can set the through rates at profit maximizing levels without help from their motor carrier subsidiaries. Permitting independent inland carrier cartels could only leave ocean carriers without inland affiliates at the mercy of those that have them, allow unaffiliated inland carriers to walk off with some of the profits, and greatly complicate negotiations among the ocean carriers when they have to start allocating the profits among inland affiliates as well as the ocean carriers themselves. Finally, to the extent only the private interests of the foreign carriers are concerned, it is difficult to see why Congress would sacrifice the interests of American carriers and shippers with no *quid pro quo*.

Finally, defendants refer to discussions of earlier versions of the bill that would have “remov[ed] foreign-to-foreign carriage from both the Shipping Act and the antitrust laws.” *Foreign-to-Foreign Agreements--Exemptions, supra*, 25 S.R.R. at 464. The intent of the Act as passed, however, was simply to avoid duplicate coverage of carriers under the antitrust laws and the Shipping Act, and to preserve antitrust protection for shippers where the Shipping Act does not apply but the commerce of the United States is affected. See H.R. Rep. 98-53, pt. 2, at 32-33.

The defendants' interpretation of exemption (4) to exempt foreign motor carriers in the U.S. import and export trades cannot be squared with that legislative intent.

4. The Policy of the Shipping Act.

For reasons set forth above (p. 5) and in the government's main brief (pp. 49-53), the defendants' generalized assertions that Congress intended a broad exemption for reasons of comity are without merit. Certain other assertions they raise here should be addressed, however.

First, the defendants raise the question of the United States' reaction to a foreign government prosecuting American companies under the same circumstances (Br. 18). The United States has consistently recognized the legitimate interests of foreign governments in conduct that takes place in this country but has an anticompetitive effect in another country. Indeed, the government specifically advises American companies that receive limited antitrust immunity with respect to U.S. export trades under such statutes as the Webb-Pomerene Act (15 U.S.C. 61-65) and the Export Trading Company Act (15 U.S.C. 4011-4021) that those laws do not grant immunity from prosecution under foreign law.¹⁴

¹⁴ See U.S. Dept. of Justice and FTC, *Antitrust Enforcement Guidelines for*
(continued...)

Conversely, the defendants also suggest that the government is interfering with the Philippine government's application of its own regulatory and antitrust laws, even to the extent the defendants might have been forced to violate Philippine law (Br. 34-35 n. 26). No Shipping Act exemption is necessary to deal with the latter problem. If the defendants could not comply both with the antitrust laws and Philippine regulatory requirements, they might have a foreign sovereign compulsion defense under the antitrust laws. See *International Antitrust Guidelines* § 3.32. Defendants, however, have never claimed legal compulsion to fix their rates in concert, nor even that they have complied with Philippine law in setting their rates.¹⁵

The defendants complain that the government's construction would leave them in an unequal bargaining position vis-a-vis ocean common carriers (Br. 33-34). The short answer to that argument is that Congress refused to grant immunity even

¹⁴ (...continued)
International Operations §§ 2.6-2.7 (April 1995), <http://www.usdoj.gov/atr/public/guidelines/internat.txt>, 1995 WL 150725 (DOJ) ("*International Antitrust Guidelines*"). See also Stark, Charles S., "A View of Current International Antitrust Issues" 11-13 (May 20, 1982) (copy attached as Addendum C to this Brief).

¹⁵ The defendants' own expert states that Philippine laws "allow for collective rate-setting among public service corporations *where such rates are filed*" with the proper agency. Agabin Affidavit, ¶3.c (emphasis added) (Addendum D to this Brief). If this case is tried, the government would be prepared to prove that the defendants' rates were never filed.

to shippers to equalize their bargaining power with ocean carrier conferences, although the Act is intended to protect shippers (U.S. Br. 42-43 n.27). Moreover, defendants have not shown how the impact on their bargaining power raises an issue of comity. In releasing ocean common carriers from the constraints of U.S. antitrust law, the Shipping Act does not interfere with any other country applying its antitrust law to them or taking other regulatory steps to protect its own inland carriers. Nor do the U.S. antitrust laws, which simply prohibit private parties from taking the law into their own hands by forming a counter-cartel, particularly where the result is likely to be even higher prices than a single cartel would cause. In any event, the only carriers in the chain of transportation here with whom defendants dealt were the U.S. freight forwarders, the immediate victims of their scheme, who had no antitrust immunity.

Finally, the defendants contend that because some other firms involved in the transportation at issue had antitrust immunity available under U.S. law, they should be given immunity also (Br. 2-3). The antitrust exemptions they cite, however, are all premised on effective regulation of the immunized conduct in the public interest. The immunity they propose would entail no U.S. regulation, and they have adduced no reason to believe that Congress could rely on our trading partners to provide

consistent regulation on behalf of U.S. interests. In any event, antitrust immunity is a matter of legislative intent, and defendants have shown nothing in the language, policy, or legislative history indicating that Congress intended the immunity they seek.

C. The Indictment Is Not Limited to Shipments Within Exemption (4).

We explained in our main brief (pp. 53-54) that the across-the-board conspiracy charged in the indictment covered all shipments of household goods of military personnel between the Philippines and the United States—and not just those moving under through transportation arrangements—so that the indictment could not be dismissed even if the defendants were right in their broad reading of exemption (4). Nevertheless, the defendants repeat the arguments they originally made in the district court that subsequent allegations in the indictment limit it to shipments carried under through transportation arrangements as defined in the Shipping Act (Br. 48-53), without attempting to meet the material arguments in our brief. For example, they continue to assert that the indictment alleged that defendants’ moving services “were part of a ‘*continuous* and uninterrupted flow of United States foreign commerce.’ E.R. 6-8, ¶¶13, 15, 16, 17, 18” (Tucor Br. 50) (emphasis supplied by

Tucor). Paragraph 13 of the indictment, however, says nothing about a continuous flow of commerce (E.R. 6-7), and as pointed out in the government's main brief (p. 59), paragraphs 15-18 do not refer to the shipping arrangements.

Beyond that, the defendants (Br. 50-52) continue to rely on factual assertions regarding the nature of the "Government Bill of Lading" referred to in paragraph 7 (E.R. 4), and DoD's arrangements with the U.S. freight forwarders.¹⁶ The function of the allegations they cite, however, is to define the conspiracy as limited to government-paid as opposed to privately-paid shipments, and to explain the impact of the conspiracy on the freight forwarders and the government, and ultimately on U.S. commerce. They provide no warrant for going beyond the record to make factual findings regarding the underlying shipping arrangements here—and even if there were such a warrant, the government has shown that a significant portion of the shipments were not through transportation movements (E.R. 59-60).

¹⁶ Defendants also suggest that ocean common carriers were somehow "involved" in through transportation here. There is nothing in the indictment or elsewhere in the record to indicate that they provided anything more than port-to-port services with respect to the shipments at issue. To the extent there were through transportation arrangements here, they were made exclusively by the U.S. freight forwarders, with whom defendants dealt, acting as NVOs.

D. The Rule of Lenity Is Not an Independent Ground for Dismissal of the Complaint

The defendants wrongly argue that dismissal of the indictment should be affirmed because the government has not contested the district court's application of the rule of lenity, which they characterize as an "independent reason" for dismissing the indictment (Br. 53).

After finding that defendants' conduct was exempted from the antitrust laws by the operation of exemption (4) (E.R. 99), the district court stated that "[e]ven if the Court were unable to conclude whether Section 7(a)(4) exempted the type of agreements at issue in this case, the Court would still be required to grant the defendants' motion" because "[i]n criminal prosecutions the rule of lenity requires that ambiguities in the statute be resolved in the defendant's favor" (E.R. 99-100) (citation omitted).

As the district court recognized, the "rule of lenity" is not an independent ground for dismissing the indictment. It is simply a rule of statutory construction which calls for construing a statute in the defendant's favor in a criminal case when "there is a grievous ambiguity or uncertainty in the language and structure of the Act *** such that even after a court has seized every thing from which aid can be

derived, it is still left with an ambiguous statute.” *Chapman v. United States*, 500 U.S. 453, 463 (1991) (internal citations and quotation marks omitted). Accord, *United States v. Terrence*, 132 F.3d 1287, 1291 (9th Cir. 1997). Moreover, “the rule of lenity cannot be used to create an ambiguity when the meaning of a law, even if not readily apparent, is, upon inquiry, reasonably clear.” *United States v. Nippon Paper Industries Co.*, 109 F.3d 1, 8 (1st Cir. 1997), cert. denied, 118 S.Ct. 685 (1998) (finding no ambiguity in application of antitrust laws to foreign conduct affecting U.S.). Thus, the application of the rule is entirely subsumed in the question raised by the government regarding the construction of exemption (4). If, as the government submits, a proper construction of that provision unambiguously supports its position, the rule of lenity is wholly irrelevant to this case. *Chapman*, *supra* at 464.

CONCLUSION

For the reasons stated in this brief and our main brief, the decision of the district court should be reversed.

Respectfully submitted.

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DECEMBER 1998

CERTIFICATION PURSUANT TO CIRCUIT RULE 32(e)(4)

Pursuant to Ninth Circuit Rule 32(e)(4), I hereby certify that the attached brief uses proportionately spaced type, has a typeface of 14 points or more, and contains 6,782 words.


Robert J. Wiggers

Date: December 28, 1998

AMENDED CERTIFICATE OF SERVICE.

I, Robert J. Wiggers, hereby certify that on this 28th day of December, 1998, I caused to be served two copies of the foregoing Reply Brief for the United States by first-class mail, postage prepaid, on each of the following:

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ADDENDUM A

Excerpts From

Transpacific Westbound Rate Agreement
FMC Agreement No. 202-010698

Attachment 35 to
Reply Memorandum of Defendants Luzon Moving & Storage et al.
District Court Docket Item 109

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OFFICE OF THE
MARITIME COMMISSIONER

TRANSPACIFIC WESTBOUND RATE AGREEMENT

F.M.C. Agreement No. 202-010689

(Fifth Edition)

**A Conference Agreement
as defined in 46 C.F.R. 572.104**

**Date of Last Republication in Accordance with § 572.403(g):
September 27, 1991**

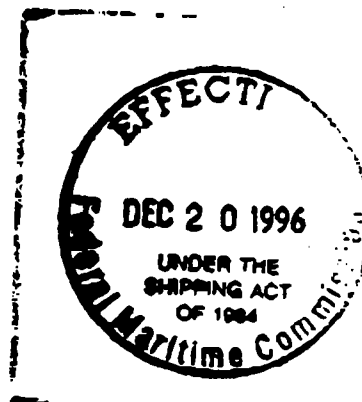
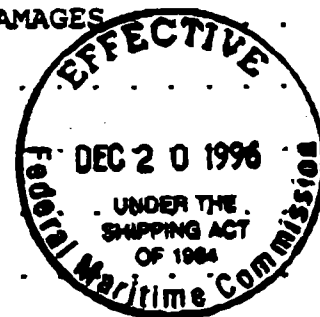


TABLE OF CONTENTS

<u>Article No.</u>		<u>Page No.</u>
ARTICLE 1:	FULL NAME OF THE AGREEMENT	2
ARTICLE 2:	PURPOSE OF THE AGREEMENT	2
ARTICLE 3:	PARTIES TO THE AGREEMENT	2
ARTICLE 4:	GEOGRAPHIC SCOPE OF THE AGREEMENT	2
ARTICLE 5:	AGREEMENT AUTHORITY	3
ARTICLE 6:	OFFICIALS OF THE AGREEMENT AND DELEGATION OF AUTHORITY	6
ARTICLE 7:	MEMBERSHIP, WITHDRAWAL, READMISSION AND EXPULSION	7
ARTICLE 8:	MEETINGS & VOTING	9
ARTICLE 9:	DURATION AND TERMINATION OF THE AGREEMENT	12
ARTICLE 10:	NEUTRAL BODY POLICING	12
ARTICLE 11:	PROHIBITED ACTS	12
ARTICLE 12:	TRADE RELATIONS, CONSULTATION, SHIPPERS' REQUESTS AND COMPLAINTS	12
ARTICLE 13:	INDEPENDENT ACTION	13
ARTICLE 14:	SERVICE CONTRACTS	18
ARTICLE 15:	BREACH OF THE AGREEMENT AND DAMAGES	20
ARTICLE 16:	ARBITRATION	21
ARTICLE 17:	EXPENSES	21
ARTICLE 18:	ADMINISTRATIVE REGULATIONS	22
ARTICLE 19:	CONTROLLED CARRIER PARTIES	22
ARTICLE 20:	EFFECTIVE DATE AND AMENDMENTS	23
APPENDIX A:	PARTIES TO THE AGREEMENT	i
APPENDIX AA:	PARTIES TO THE INDIA SUBCONTINENT TRADE AGREEMENT	ii
APPENDIX B:	ESTABLISHMENT OF SELF-POLICING PROGRAM	iii



ARTICLE 1: FULL NAME OF THE AGREEMENT

The full name of this agreement is the Transpacific Westbound Rate Agreement (the "Agreement").

ARTICLE 2: PURPOSE OF THE AGREEMENT

The purpose of this Agreement is to foster commerce, service and stability in the trade while maintaining competition and freedom of carrier action.

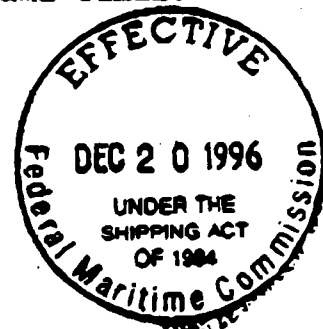
ARTICLE 3: PARTIES TO THE AGREEMENT

The parties (the "Parties") to this Agreement, the full legal name of each Party, and the address of its principal office are listed in Appendix A.

ARTICLE 4: GEOGRAPHIC SCOPE OF THE AGREEMENT

(a) The Trade. The trade covered by this Agreement consists of the transportation of cargo that moves on liner vessels, that originates at points and ports in the United States, that moves from or via ports on the Atlantic, Gulf and Pacific Coasts (including Alaska) of the United States, and that is destined to points and ports in Japan, Korea, Taiwan, Siberia USSR, the People's Republic of China, Hong Kong, Macau, Vietnam, Democratic Kampuchea (Cambodia), Thailand, Laos, the Republic of the Philippines, the Republic of Singapore, the Federation of Malaysia, the Sultanate of Brunei, and the Republic of Indonesia (the "trade").

(b) India Sub-Continent Trade. Activities specified under Article 5(a)(i) and (f) shall be authorized with respect to the transportation of cargo, that moves in all-water or intermodal service, under through bills of lading or otherwise, directly or by transshipment, from ports and points in the United States, that is loaded at Pacific Coast ports, and that is destined to ports or points in India, Pakistan, Bangladesh, Sri Lanka and Burma (hereinafter "India Sub-Continent" trade) For the limited purpose of performing service contracts for shippers requiring service both to destination ports and points covered by Article 4(a) and to destination ports and points covered by Article 4(b) the scope of this Agreement shall include service provided under a service contract to all such destinations via any Pacific coast port or via Gulf or East coast ports via the Panama Canal.



ARTICLE 5: AGREEMENT AUTHORITY

(a) (i) General Scope. Subject in all cases to the right of independent action set forth in Article 13 of this Agreement, the Parties are authorized to consider all aspects of transportation and service in the trade and to discuss, agree upon, establish, abolish, or change all rates, charges, classifications, practices, terms, conditions, and rules and regulations applicable to transportation of cargo moving within the trade covered by this Agreement and applicable to services provided in connection therewith. Such authority includes, but is not limited to, the following subjects and relationships between or among them: Port-to-port rates (including all water routes to and from ports and/or places or points on inland waterways tributary to all said ports and ranges), overland rates, mini-land-bridge rates, interior point intermodal rates, port area inter-modal rates, proportional rates, through rates, the inland portion of through rates, joint rates, minimum rates, surcharges, arbitraries, volume rates, time/volume rates, project rates, freight-all-kinds rates, volume incentive programs, loyalty arrangements conforming to the antitrust laws of the United States, fidelity commission systems, service contracts, consolidation, consolidation allowances, rates on commodities exempt from tariff filing, absorptions, equalization, substituted services, allowances, freight forwarder compensation, brokerage, the conditions determining such compensation or brokerage and the payment thereof, receiving, handling, storing and delivery of cargo, designation of base ports and points, pick up and delivery charges, free time practices, detention, demurrage, container freight stations, port and inland container yards and container depots, terminals and other points of cargo receipt, vanning, devanning, equipment positioning, furnishing equipment to or leasing equipment from shippers/consignees/inland carriers/others (including the leasing of shipper- or consignee-provided containers or other equipment made available to shippers or consignees by leasing companies or other persons), collection agents at destination, maintaining and distributing information and data and statistics and all other rules, regulations and matters ancillary to transportation of cargo moving pursuant to the authority of this Agreement, including rules regarding the time and currency in which payments hereunder shall be made, credit conditions, financial security arrangements, suspension and restoration of credit privileges, handling of delinquent accounts and interest thereon. The Parties may in any manner discuss any rate or rule on which independent action has been taken, matters on which rates are "open" with or without minimum requirements, and individual, group or Agreement service contracts. The



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TRANSPACIFIC WESTBOUND RATE AGREEMENT Original Page No. 3a
F.M.C. No. 202-010689-064 (5th Edition)

parties, or any group of the parties, are authorized to caucus or otherwise to discuss, consider, agree and exchange information concerning any subject within the scope of this Agreement or the Westbound Transpacific Stabilization Agreement, including matters decided by, pending before or which may be proposed to or by this Agreement, the Westbound Transpacific Stabilization Agreement or any of its members, for the purposes of clarifying differences, endeavoring to reach common positions, communicating, discussing, negotiating, or reaching consensus with any other party or parties hereto or with the Westbound Transpacific Stabilization Agreement or with any member or members of either.

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TRANSPACIFIC WESTBOUND RATE AGREEMENT
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Original Page No. 1
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(ii) Certain Minimum Rates. Any minimum rates (other than minimum rates applicable to commodities that are not required by statute or this Agreement to be subject to a right of independent action) that are agreed upon or otherwise adopted by the Parties under this Agreement shall in all cases be subject to further adjustment or revocation under the normal ratemaking processes of the agreement as set forth in this Article and in Article 8 and to the right of independent action set forth in Article 13.

(b) Rates and Tariffs. The Agreement will publish a common tariff (or tariffs). Each Party shall adhere strictly to the rates, charges and rules in such tariff(s) and in any separate tariff(s) subject to this Agreement. The rates, charges and rules in such tariff(s), which may be but are not required to be the same for all Parties and services, will be set in accordance with the voting procedures in Article 8(d) of this Agreement, subject to the right of independent action as set forth herein.

(c) Transition and Related Provisions. A Party joining this Agreement which has its own tariff(s) in the trade may, upon obtaining any special permission required by the Federal Maritime Commission, continue its individual tariff(s) in effect for a transition period as may be mutually agreed upon between the party and the TWRA following the date its membership herein is effective. During such transition period, the Party and TWRA will cooperate to rationalize the rates and rules in the TWRA tariff(s) and the tariff of the new Party to permit the Party to make an orderly transition to use of the TWRA tariff(s).

(d) Loyalty Contracts. No Party may enter into a loyalty contract, except that a Party joining this Agreement (and that has not been a Party hereto during the twelve (12) months prior to the effective date of its membership) may perform its obligations under any loyalty contract(s) which it became legally obligated to perform prior to the date it applied for such membership and subject to the contract termination, non-renewal, reporting and other obligations set forth with respect to individual service contracts under Article 14(a).

(e) Exempt Commodity Rates. All rates applicable to commodities for which rates are not required by the Shipping Act of 1984 to be filed with the Federal Maritime Commission (hereinafter "exempt commodities") shall be stated in Agreement tariffs and assessed by the Parties in the form of "any quantity" rates, including, but not limited to, rates expressed in units of weight or measurement or per carton, but not as "per container" rates. Rates subject to this sub-paragraph shall be applied to the actual quantity of freight shipped and no maximum charge per shipment or per container shall be permitted.

TRANSPACIFIC WESTBOUND RATE AGREEMENT Original Page No. 5
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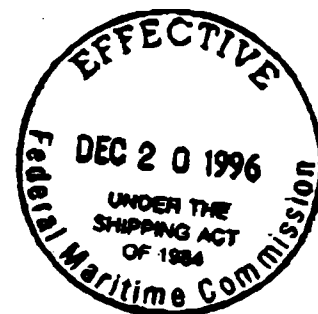
(f) India Sub-Continent Trade.

(i) This Article 5(f) applies exclusively to the India Sub-Continent trade. The Parties to the section of this Agreement that is applicable to the India Sub-Continent Trade (hereinafter "India-Sub-Continent Trade Parties"), or any of them, are authorized, but not required, to meet, compile, exchange and discuss information and data, and to consider, discuss and reach consensus and agreement upon those subjects referred to in Article 5(a)(i) with respect to the India Sub-Continent Trade. This authority includes, but is not limited to, any discussions and agreements of the India Sub-Continent Trade Parties concerning terms and conditions in their own individual tariffs and service contracts. Meetings may be in person or by telephone, telex or other electronic means.

(ii) The India Sub-Continent Trade Parties have no obligation to adhere, other than voluntarily, to any consensus or agreement reached under the authority of Article 5(f)(i), except insofar as they enter into an Agreement service contract covering both destination ports or points set forth in Article 4(a) and those in Article 4(b).

(iii) The India Sub-Continent Trade Parties may utilize Agreement staff, communications and physical facilities in carrying out this agreement. All costs and expenses incurred in administration of the India Sub-Continent Trade section of this Agreement shall be borne by such Parties as they may from time to time agree.

(iv) Articles 1-3, 4(b), 5(a), 5(d), 5(f), 7(d), 9, 11, 12, 14(e), 16-18 and 20 shall apply to the India Sub-Continent Trade and to the India Sub-Continent Trade Parties, but other provisions of this Agreement shall not.



ADDENDUM B

Excerpts From

**Asia North America Eastbound Rate Agreement
FMC Agreement No. 202-010776**

**Attachment 36 to
Reply Memorandum of Defendants Luzon Moving & Storage et al.
District Court Docket Item 109**

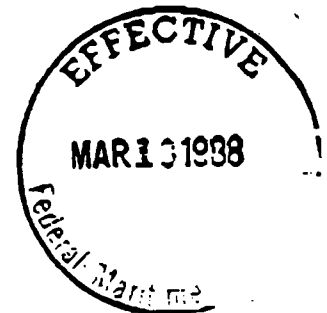
Original Title Page

ASIA NORTH AMERICA EASTBOUND RATE AGREEMENT

FMC AGREEMENT NO. 202-010776

**An Agreement Among
Ocean Common Carriers**

**This Agreement was Previously Published and
Became Effective on August 15, 1985**



Asia North America Eastbound
Rate Agreement
Agreement No. 202-010776-052
Second Revised Page No. 2

ASIA NORTH AMERICA EASTBOUND
RATE AGREEMENT

THE PARTIES HERETO AGREE AS FOLLOWS:

ARTICLE 1 - NAME OF AGREEMENT

The full name of this Agreement is the ASIA NORTH AMERICA EASTBOUND RATE AGREEMENT ("Agreement").

ARTICLE 2 - PURPOSE OF AGREEMENT

The purpose of this Agreement is to foster commerce, service and stability in the trade while maintaining competition and freedom of carrier action.

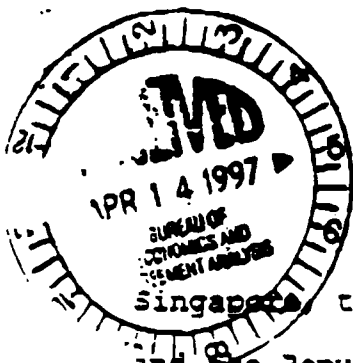
ARTICLE 3 - PARTIES TO THE AGREEMENT

The names and principal office addresses of the parties to the Agreement are listed in Appendix A.

ARTICLE 4 - GEOGRAPHIC SCOPE OF THE AGREEMENT

4.1 This Agreement covers the transportation of cargo on liner vessels, whether moving in all water or intermodal service under through bills of lading or otherwise, direct or by transshipment, from (1) ports and points in Hong Kong, Macao, Taiwan, Siberia USSR, the People's Republic of China ("North Asia Range") and Korea, and (2) ports and points in Thailand, Vietnam, Democratic Kampuchea (Cambodia), Laos, Burma, the Republic of the Philippines, the Republic of





202.010776-103

Asia North America Eastbound
Rate Agreement
Agreement No. 202-010776-103
Fourth Revised Page No. 3

Singapore, the Federation of Malaysia, the Sultanate of Brunei and the Republic of Indonesia ("South Asia Range") to ports on the Atlantic, Gulf and Pacific coasts of the United States

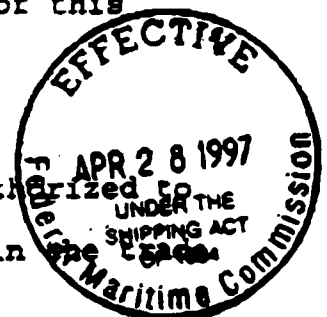
United States is defined to also include Alaska, Puerto Rico and the U.S. Virgin Islands) and to interior or coastal points in the United States via such ports (all of the foregoing hereinafter referred to as the "trade").

4.2 Sub-Continent Trade. Activities specified under Article 5.3 shall be authorized with respect to the transportation of cargo, whether moving in all water or intermodal service, under through bills of lading or otherwise, direct or by transshipment, from ports and points in India, Pakistan, Bangladesh and Sri Lanka to ports on all coasts of the United States and U.S. interior or coastal points via such ports all of the foregoing hereinafter referred to as the "sub-continent trade").

4.3 The trade from ports in Japan to ports and inland and coastal points in the United States (including Puerto Rico and the U.S. Virgin Islands), but solely for the limited purpose of crediting cargo moved in said trade under ANERA group or joint service contracts as authorized in Article 14.1(A) of this Agreement.

ARTICLE 5 - AGREEMENT AUTHORITY

5.1 Trade Authority. The parties are authorized to consider all aspects of transportation and service in the trade and to:



Asia North America Eastbound
Rate Agreement

Agreement No. 202-010776-050

Original Page No. 3a

- (a) Discuss, agree upon, establish, cancel, maintain and revise all rates, charges, rules, regulations, classifications, practices, terms and conditions applicable to the carriage, handling and transportation of cargo in the trade and to any other services provided in connection therewith. Such rates and charges may either be uniform or provide for differentials among the parties and include, without limitation, the following: port-to-port rates (including all water rates to and from ports and/or places or points on inland waterways tributary to all ports within the scope of this Agreement), overland or overland common point (OCP) rates, through minilandbridge, port area or interior point intermodal rates (whether single factor, multi-factor or otherwise), the inland portion of any through rates, joint rates, proportional rates, minimum rates, surcharges, arbitraries, volume

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Asia North America Eastbound
Rate Agreement
Agreement No. 202-010776
Original Page No. 4.

rates, time-volume rates, volume incentive programs, freight-all-kinds rates, project rates, loyalty arrangements conforming to the antitrust laws of the United States, amounts of brokerage and freight forwarder compensation and conditions for the payment thereof, fidelity commission systems unless in violation of Section 10(b)(9) of the Shipping Act of 1984, and rates on commodities exempt from tariff filing;

- (b) Discuss, agree upon, establish, cancel, maintain and revise all rates, rules, charges and practices relating to base ports and points, per diem, free time and detention on carrier-provided containers, chassis and related equipment, furnishing or leasing equipment to or from shippers, consignees, inland carriers and others, collection agents at destination, interchange with connecting carriers, terminal and shoreside loading operations, including wharfage, free time and demurrage, receipt, vanning, devanning, handling, storage, pick up and delivery of cargo, consolidation and consolidation allowances, absorptions, equalizations, substituted or alternate port service, other allowances, container yards, depots, port and inland container yards, and container freight stations;
- (c) Declare any tariff rate, rule or regulation on specified commodities to be "open", with or without agreed minima or special conditions, and thereafter declare the rates, rules or regulations on such commodities or any of them to be closed;
- (d) Agree upon and establish tariffs, amendments and supplements thereto, including separate tariffs pertaining to service within any Range or portion of the trade covered by this Agreement;
- (e) Keep, compile and distribute records and statistics and information, including market

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Asia North America Eastbound
Rate Agreement
Agreement No. 202-010776
First Revised Page No. 5

data, as may be required or deemed helpful to the interests of the parties;

- (f) Agree upon the establishment of charges and other tariff conditions relating to the movement, handling and storage of empty containers and other intermodal equipment;
- (g) Make arrangements or other agreements among the parties with rail, air or motor carriers or carriers by water, other than common carriers by water subject to the Shipping Act of 1984, concerning the movement of cargo from inland points to loading ports;
- (h) Agree upon all matters ancillary to the transportation of intermodal shipments within the scope of this Agreement to the maximum extent as may from time to time be permitted by applicable law;
- (i) Agree upon, establish, maintain, revise and cancel rules relating to the payment of rates and charges published pursuant to this Agreement, such as rules regarding the time and currency in which payments shall be made and rules governing the extension of credit by the parties, including rules prohibiting the extensions of credit, bonding and/or security requirements and provisions denying credit to any shipper, consignee or forwarder which is in default of or has failed to comply with the credit rules set forth in the Agreement tariff(s) for any shipment moving under such tariff(s);
- (j) Agree upon, negotiate and discuss with shippers, shippers' associations or other shippers' groups all matters covered by this Agreement or other matters of common interest;
- (k) Negotiate, offer and enter into joint service contracts, as per Article 14 herein.

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Asia North America Eastbound
Rate Agreement

Agreement No. 202-010776-062

Fifth Revised Page No. 6

- (l) Meet together for the purpose of considering formulating, negotiating and entering into any agreement within the scope of the U.S. Shipping Act of 1984, and in connection therewith exchange relevant information; provided, however, that no such agreement shall be implemented except in accordance with such Act;
- (m) Agree upon, establish, cancel, maintain and revise, by a unanimous vote (or written consent) less two (2) of all parties entitled to vote, compensation or allowances to be granted or paid by the parties to container freight station (CFS) and container yard (CY) operators in origin countries covered by this Agreement;
- (n) Agree upon, establish, cancel, maintain, and revise the compensation paid to connecting carriers.
- (o) (i) The parties are authorized to transmit to and exchange with the TransPacific Discussion Agreement ("TDA") (FMC Agreement No. 203-011211) and TransPacific Stabilization Agreement ("TSA") (FMC Agreement No. 203-011233), and some or all of the members of TDA and TSA, such information, data, and reports concerning matters within the scope of this Agreement (including without limitation, matters pending before or decisions made by the Agreement, positions, proposals, service contracts, tariffs and service contract or other offers of the Agreement or Agreement parties or group of parties, and data or information relating to any of the foregoing) as they deem appropriate from time to time. Said information, data and reports may be transmitted by a designated Agreement party or parties or under the direction of the Managing Director. Information, data and reports transmitted to TSA or TDA or its members shall not be subject to the restrictions or Article 15.3 hereof.
- (ii) The Agreement is authorized to receive from TDA or TSA or any members of TDA and TSA, information, data and reports as to matters pending before or decided by TDA or TSA, positions, proposals, service contract or other



Asia North America Eastbound
Rate Agreement
Agreement No. 202-010776-062
Fifth Revised Page No. 7

offers, service contracts or tariffs filed or to be filed with the FMC, of any TSA member and data or information relating to any of the foregoing. Said information, data and reports may be transmitted to the Agreement from the TDA or TSA administrator, or through any Agreement party or parties which are members of TDA or TSA. The Agreement parties are authorized to discuss and reach agreements based upon information, data and reports received from TDA or TSA (including without limitation agreements or recommendations reached within TDA or TSA), and to take such actions pursuant to the authorities set forth in this Article 5 as are deemed necessary or appropriate to implement any or all agreements and recommendations reached within TDA or TSA.

(iii) The parties or any group of the parties are authorized to caucus or otherwise discuss, consider, agree and exchange information concerning any matter within the scope of this Agreement, including matters decided by, pending before or to be proposed by the Agreement, or TSA or any of its members, for the purpose of clarifying differences in their respective viewpoints regarding such matters and of endeavoring to reach common positions for communication to, discussion or negotiation with, any other party or parties, or to the TSA or TDA, or any member of either.

(iv) The foregoing agreements and actions may be taken by the Agreement whether or not any agreement or recommendation reached within TSA or TDA includes carriers which are not parties hereto.

(v) The Managing Director and ANERA Secretariat staff may perform administrative functions to implement or facilitate the foregoing agreements and actions.

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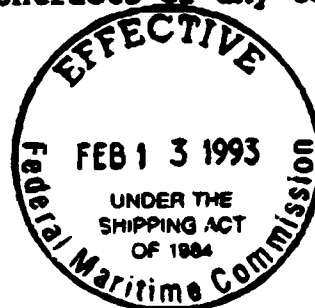
Asia North America Eastbound
Rate Agreement

Agreement No. 202-010776-073

First Revised Page No. 7a

- (p) Agree upon, maintain, revise, cancel and otherwise regulate the rates, terms and conditions of the parties' arrangements with non-Agreement transportation providers ("NTP's") with respect to the movement of cargoes from the Peoples Republic of China ("PRC") to the United States, whether or not under a through bill of lading from the PRC and whether or not said bill of lading is issued by a party hereto or by an NTP. The foregoing arrangements include: (i) truck, rail and water transportation services within the PRC and between the PRC and Agreement origin countries at which an Agreement party's vessel calls (whether or not as part of a transshipment, connecting carrier, subcontract, or joint service offering); (ii) warehousing, terminal, stevedoring, receiving and consolidation functions and facilities; (iii) agency and Customs clearance functions; (iv) equipment lease and interchange; and (v) other functions and facilities associated with the solicitation, receipt and transport of cargo from the PRC. The term "NTP's" includes vessel operators, truckers, railroads, forwarders, NVOCCs, and any other person performing or purporting to perform the aforementioned functions. The authority set forth herein is in addition to and without limitation of any authority set forth elsewhere in the Agreement.

5.2 Individual Loyalty Contracts. No party, either individually or jointly with any other carrier or carriers, may enter into an individual loyalty contract for the transportation of cargo in the trade. Notwithstanding any other provisions of this Agreement, the parties are prohibited from taking independent action as to any decisions or actions of the Agreement with respect to loyalty contracts or any terms or conditions thereof.



ADDENDUM C

Speech by Charles S. Stark
Chief, Foreign Commerce Section
Antitrust Division

A VIEW OF CURRENT INTERNATIONAL ANTITRUST ISSUES

Remarks by

CHARLES S. STARK
Chief, Foreign Commerce Section
Antitrust Division

Before the

World Trade Institute Seminar
on Advanced International Antitrust
Practices and Related Trade Issues

Four Seasons - Clift Hotel
San Francisco, California

May 20, 1982

According to the program for today's session, I am here to offer you the "perspective of the Antitrust Division." Since others on the program will be discussing individual subjects in some depth, I plan to take the liberty afforded by my topic to talk more generally over a range of international antitrust concerns to which we have paid particular attention during the recent period.

International antitrust issues have been of enormous interest in recent years. In a period of expanding international trade, we continue to hear complaints from American business that U.S. antitrust enforcement is hamstringing our enterprises in their ability to compete in world markets. A number of foreign governments continue to object to what they view as the threat to their sovereignty and trading interests represented by the so-called "extraterritorial" reach of antitrust law - and in several instances have expressed their objection by enacting blocking statutes. Congress continues to explore export trading company legislation which it is thought will enhance our export competitiveness by reducing antitrust uncertainty. Programs like today's, designed to keep the bar abreast of the latest international antitrust developments, are scheduled with increasing frequency.

In view of this intense interest, you may be surprised - as I was in reviewing our recent activities - that in the last 14 months, no suit filed by the Antitrust Division has challenged transnational conduct. In over a year, we have not challenged an American firm's acquisition of a foreign enterprise, or a foreign firm's acquisition of an American enterprise. Nor have any of our cases during the period involved foreign conduct by either American or foreign firms.

I have not mentioned this fact to suggest that we have gone out of the international antitrust business. We most certainly have not. During the period I am referring to, cases of this nature that were brought earlier have been terminated or remained pending, and new investigations have been started that may well result in the filing of such cases in the future. But the relative infrequency of cases involving transnational or foreign conduct does suggest that American businesses' fears of antitrust in regard to their foreign operations, and the fears of foreign firms and their governments, may be somewhat exaggerated.

American business has far greater latitude to order its export trade and its foreign business without running afoul our antitrust laws than one would suppose listening to the rhetoric about antitrust as an export disincentive. Few joint export activities are likely to raise problems under our antitrust laws. Joint arrangements intended to achieve efficiencies in

marketing, shipping, and the like where the firms involved don't have the capacity to export effectively on an individual basis, are likely to promote rather than lessen competition, and therefore not be a subject of antitrust concern.

Similarly, joint ventures to engage in large projects where the investment or risk is beyond the capacity of the individual participants, in which therefore promote rather than lessen competition, are not illegal. But even those joint export activities that do lessen competition in foreign markets to the detriment of foreign consumers, through price agreements or customer and territorial allocations, are not the concern of U.S. antitrust law as long as their anticompetitive effects are limited to those foreign markets. Our antitrust laws are designed to protect U.S. interests, and arrangements whose adverse impact, if any, falls only on foreign consumers and markets is simply outside the law's subject matter jurisdiction. To give added perspective to the leeway our law allows for joint export arrangements, I should add that the Antitrust Division has not challenged an export joint venture in over two decades. I should add a caveat, though. While our law may take a liberal view of the permissibility of anticompetitive restraint directed at foreign consumers, the country whose consumers are affected may take quite a different view under its own law - a subject I will return to later.

Joint export arrangements are not the only area in which widely held impressions of antitrust risk greatly exceed the extent of the actual risk. The same can be said of transnational licensing and distribution arrangements. Here, too, the general principle that restraints whose only competitive impact is on foreign consumers and foreign markets are beyond the reach of our antitrust laws applies. Beyond that proposition, though, there are relatively few international licensing and distribution practices that should create antitrust risks for U.S. businesses. I emphasize "should," because this is an area where the case law is developing and in which the Antitrust Division's views and enforcement policy may be more permissive than those of potential private litigants. But it is probably fair to say that the direction of the law's development in regard to vertical arrangements, including licensing and distribution arrangements, is toward distinguishing between those arrangements which lessen competition and those which, while involving restrictions between the parties, in fact enhance competition.

Generally, as I am sure you know, the present administration's view is that purely "vertical" restraints may well enhance distribution efficiencies and promote competition. This view extends to arrangements involving technology transfers, where the parties should have a good deal of freedom to select the most effective licensing terms. Where

territorial and other restrictions within licensing arrangements are reasonably ancillary to a bona fide transfer of patent or know-how rights, they should not ordinarily present antitrust problems and U.S. companies should not be reluctant to consider such terms in international licenses. The "nine no-no's" - a list of licensing practices which the Division said in the early 1970's it would invariably view as unlawful - no longer reflect the Division's policy. The "no-no's" included rules against tie-ins, resale restraints, exclusivity and "packaging." Basically, the Division's present view is that if the intent and effect of restrictions in licensing arrangements is not to stifle competition but to efficiently exploit the technology being transferred, it is likely to pass antitrust muster. Of course, licensing arrangements between firms which are or would likely be competitors in the field in which the technology is being transferred, and which displace competition that would otherwise have occurred, will continue to raise serious antitrust questions, as indeed they should. But generally speaking, businesses should consider themselves freer than perhaps they did in the past to enter into licensing arrangements which promote their competitiveness in domestic and foreign markets.

When this program originally was scheduled, I had hoped that the Justice Department's new merger guidelines would have been announced by now. If they had been, I would have taken this opportunity to explain the approach they take to realistically assessing the impact of existing and potential competition from foreign firms in our markets, and allay the the sometimes expressed concern that merger analysis takes insufficient account of the realities of world markets. Unfortunately, it is taking longer than was originally hoped to finish the project. I can only say that reflecting those competitive realities is one of the project's principal aims, and leave discussion of the specifics to the time of their announcement which is expected about three weeks from now.

I have spoken up to now about perceptions and criticisms of U.S. antitrust policy that have sometimes emerged from the American business community. As I mentioned earlier, and as was discussed in some depth on this morning's program, foreign governments have had their own sometimes unflattering views of American antitrust enforcement as it affects the operations and potential liability of their nationals. We don't, and never have, relished these differences with some of our closest allies and trading partners. Ultimately, the only real resolution lies in developing a tacit consensus or express

multilateral or bilateral agreements for deciding when one country may impose its laws and policies on transnational business conduct which affect it without objection from the other countries involved. Until then, we will continue to make enforcement decisions which as fully and fairly as possible take into account the interests of affected foreign nations as well as our own, and will encourage the continued development of a similar approach by the courts in private litigation.

I do have some optimism about the direction in which we are moving. While the case law is far from well developed or fully consistent, the adoption in an increasing number of judicial circuits of the principle of comity, or balancing of U.S. and foreign interests, is certainly encouraging. The Timberlane^{1/} and Mannington Mills^{2/} approach of the Ninth and Third Circuits has been followed by the Tenth Circuit in the Montreal Trading^{3/} case. The Second Circuit in the National Bank of Canada^{4/} case and the Fifth Circuit in its recent Mitsui^{5/} decision both have recognized the need to balance U.S. and foreign interests in deciding whether the assertion of jurisdiction by a U.S. court is appropriate. While the Seventh Circuit's decision in the Uranium Litigation^{6/} been characterized by some as a rejection of this approach, I do not think that is a correct characterization. The court in that case left the issue open, and held only that the district court could not realistically

be required to engage in a balancing exercise where, because of the nonappearance of the defendants, it did not have the facts available to it.

On another optimistic note, we have sensed in our discussions with other governments a decided trend away from the more pervasively confrontational mood of a few years ago. There seems to be an increased willingness to deal with issues that arise on a case-by-case basis, and to realistically assess both countries' interest in particular matters.

One example of this pragmatic approach occurred earlier this year, in connection with an antitrust grand jury investigation involving a number of U.S. and Canadian trucking companies. The facts I will relate to you became part of the public record in a proceeding to enforce grand jury subpoenas calling for documents located in Canada. In resisting the production of those documents, the firms argued that the matter raised "serious and complex issues concerning conflict between American and Canadian law and the application of the doctrine of international comity." At the same time, they filed an action in the Supreme Court of Ontario for, in effect, a declaratory judgment as to whether the Ontario blocking statute precluded their complying with the subpoenas.

While the Ontario court ultimately declined to decide the question, a representative of the Ontario Attorney General's office appeared in the proceeding and advised the court that

the Attorney General had no present intention to apply for an order under the Ontario statute to prohibit transmission of the documents. Moreover, the Attorney General's office, in a letter to one of the companies, advised that they interpreted the law as applying only to originals of documents, not to copies of them.

As you may know, the Justice Department for some years has generally followed a practice of seeking foreign located documents on a voluntary basis, rather than by compulsory process. Our decision to depart from that practice in this investigation followed extensive consultations with the Canadian Government, in which we told them about the nature and extent of the investigation. In turn, they advised us that they would not oppose the subpoenaing of relevant documents in Canada, and that they would consult with appropriate provincial officials. Most of this background is set out in the Justice Department's papers supporting its motion to show cause why the companies should not be held in contempt for failure to comply with the subpoenas. The papers included an affidavit of the State Department's Office of Canadian Affairs as well as an affidavit of the Canadian lawyer who represented the United States in the Ontario declaratory judgment action.

I have described this instance to illustrate the point that our differences with a number of countries over jurisdictional reach have not displaced the possibility of cooperation. As I

indicated earlier, the willingness of a number of these countries to react on a case-by-case basis, rather than on the basis of broad and rigid jurisdictional objections, is on the increase.

This trend is accompanied, in my perception, by an increased willingness to evaluate and discuss even the broader jurisdictional questions in a way that recognizes the realities of overlapping national interests. As recently as this past week, we met in Washington with representatives of the Australian Government to resume our nearly four-year old talks about a possible bilateral antitrust arrangement. While I cannot yet report the signing of a final agreement, the meetings were particularly constructive and substantially advanced each side's appreciation of the other's concerns. I believe I can safely say that both sides are optimistic about the likelihood of completing an agreement in the near future. We also have explored possible bilateral arrangements at various times with Canada, the United Kingdom and Japan, and have had an agreement in place with the Federal Republic of Germany since 1976. While we are far from achieving a universal consensus, after an intensely confrontational period we seem at least to be inching once again in the right direction.

That concludes the dovish portion of my remarks. I have been talking so far about circumstances in which in our antitrust laws don't apply, or in which their enforcement is

moderated in the international area. That is, of course, only one side -- though a crucial and inseparable side -- of the coin. The other side, simply put, is the Antitrust Division's basic mission to enforce the laws that reflect this country's fundamental commitment to competition as the ordering principle in our markets. In order to give effect to that commitment, our antitrust laws do and, in our economically interdependent world, must in some circumstances reach conduct outside our borders that deprives U.S. consumers of the benefits of competitive markets. Changes in methods of economic analysis have not altered that fundamental commitment, which the Attorney General put this way in an address last summer:

United States antitrust law stopped the threatened cartelization of basic world markets by our own firms earlier in this century. We do not now intend to dilute the force of those laws in discouraging U.S. firms or other firms with significant U.S. contacts from attempting to cartelize markets in which U.S. citizens buy.

The United States is far from alone in applying the "effects doctrine," as this notion is sometimes called. The principle that an adverse effect on one's markets can be a basis for applying one's antitrust laws to conduct that originated elsewhere has been incorporated in some measure in many of the most developed legal systems, including those of Germany, Canada, Sweden, and the competition rules of the Common market.

While not all of our trading partners enforce their competition laws with equal vigor, the increasing number of instances in which foreign antitrust laws are applied to transnational conduct, often involving U.S. firms, seems to me one of the more significant developments of the recent period. To take one recent example, the German Cartel Office recently objected to Philip Morris' acquisition of a fifty percent interest in Rothmans Tobacco Ltd. Although the immediate parties to the transactions were American and British companies, German subsidiaries of the two firms held substantial shares of the German cigarette market. The Cartel Office objected to the transaction on the ground that its effect would be to eliminate competition between the two German subsidiaries and increase concentration in the German cigarette market. The decision is being appealed.

Another matter of some interest is a proceeding begun last year by the competition authorities of the European Commission. The Commission issued a Statement of Objections alleging price fixing in sales to the Common Market among a large group of wood pulp producers. A number of European and North American producers were named in the Statement of Objections, as well as the Pulp, Paper and Paperboard Export Association, an American Webb-Pomerene association of wood pulp exporters. The proceeding aroused a good deal of concern among members of other Webb-Pomerene associations, who were afraid it signalled a broad attack by the European Commission on the

activities of Webb associations in the Common market. In fact, that concern gave rise to the first instance of which I am aware in which the United States Government asked for consultations with foreign authorities because of the possible impact of a foreign antitrust proceeding on U.S. interests. While we and other governments ordinarily view consultations of this sort as confidential diplomatic exchanges, we wanted in this case to convey the Commission's clarification of the nature of its proceeding to American firms that had expressed concern, and the Commission said it would not object to our doing so^{7/}. To highlight two of the points that were made, the Commission said it had no intention of proceeding automatically against Webb associations active in the common market. The Commission does, however, consider that export associations whose activities have substantial anticompetitive effects in the Common market may violate community competition law, even if - as is the case of Webb-Pomerene associations, - the activities are authorized in the association's home country. I should note that the Justice Department takes a similar view of agreements among exporters aimed at our market.

Setting aside the merits of particular cases, we view the increasingly vigorous enforcement of other countries' competition laws to transnational conduct that impacts their

markets as an enormously encouraging development. As more business activity extends across national boundaries, common acceptance of the notion that cartelization is unacceptable and common willingness to enforce that principle is the only way to preserve competitive world markets. Competitive world markets, as most nations agree at least in principle, offer the best hope for the most efficient distribution of the world's resources. The Justice Department will continue to play its role in working toward that end.

1/ Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976),

2/ Mannington Mills v. Congoleum Industries, Inc., 610 F.2d 1059 (3d Cir. 1979).

3/ Montreal Trading Limited v. Amax Inc., 661 F.2d 864 (10th Cir. 1981), Cert. den. ____ U.S. ____ (1982).

4/ National Bank of Canada v. Interbank Card Association & Bank of Montreal, 666 F.2d 6 (2d Cir. 1981).

5/ Industrial Development Corporation v. Mitsui & Co., Ltd., ____ F.2d ____ (5th Cir. 1982), 42 BNA Antitrust & Trade Regulation Report 752 (4/8/82).

6/ Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980).

7/ The text of a summary of the consultations, prepared by the United States participants in the meeting in order to respond to inquiries from interested U.S. businesses, follows:

U.S.-EC CONSULTATIONS ON THE EC'S
PROCEEDING AGAINST WOOD PULP PRODUCERS

U.S. and European Commission (EC) officials held informal consultations January 14 in Paris on the EC proceeding against wood pulp exporters. The United States had asked for the consultations in order to clarify those parts of the Commission's Statement of Objections that deal with the Pulp, Paper and Paperboard Export Association (KEA), a Webb-Pomerene Association of wood pulp exporters. The United States was concerned that the case, as set forth in the Statement, might constitute a general attack on the Common Market activities of Webb-Pomerene associations, including activities which may enhance rather than lessen competition.

Manfred Caspari, Director-General of the EC's Directorate-General for Competition, assured U.S. officials that:

-- The EC had no intention to proceed automatically against any Webb-Pomerene association engaged in export trade in Europe, either on the basis of their status as Webb associations or because of information exchange activities of a type that do not facilitate price fixing.

-- The EC case against world wood pulp exporters is for price-fixing among a multinational group of producers; it is specifically aimed at an alleged pattern of price announcements and other price communications for wood pulp involving North American and European producers. The involvement of the KEA as an export association is significant in the Commission's view, because it provides a mechanism for price collusion which might otherwise be impossible in a market with so large a number of sellers.

-- Exchange of information and the use of joint selling agents are not per se violations of EC law. The legality of an information exchange depends on the nature of the information, the purpose of the exchange, and its effect on competition. Also the EC will carefully scrutinize the use of joint selling agents where it does not contribute to competition by facilitating access to the market by smaller firms which do not have the ability to market independently.

-- Mr. Caspari invited the U.S. Government to sit in on the EC wood pulp hearings as an observer (if the respondents agreed) and to engage, if desired, in further government-to-government consultations on the case before a final decision is made.

-- The Commission considers that export associations whose activities have substantial anticompetitive effects in the Common Market may violate Community competition law, even if the activities are authorized in the association's home country. (It should be noted that the United States Department of Justice takes a similar view of agreements among exporters aimed at our market.)

The Commission also advises that if a Webb-Pomerene Association wishes to clarify its legal position with regard to the possible application of competition rules of the Treaty of Rome, it can do so by applying for a "negative clearance" (Article 2 of Regulation No. 17/62/EEC) or an exemption according to Article 85(3) of the Treaty (Article 6 of Regulation No. 17/62/EEC).

In general the U.S. delegation was satisfied with the results of the consultation. In particular we were pleased with their assurance that the EC did not intend to pursue action "automatically" against other Webb-Pomerene associations, their clarification that other non-price fixing activities were not per se violations of Community law, and their characterization of the wood pulp proceeding as a case against price-fixing.

We will continue to monitor the case, paying close attention to the EC's handling of DEA's Webb-Pomerene status, and will continue our dialogue with the Commission on the general question of EC treatment of U.S. export associations.

ADDENDUM D

Affidavit of Dr. Pacifico Agabin

**Exhibit 10 to
Memorandum of Defendants Luzon Moving & Storage et al.
District Court Docket Item 92**

REPUBLIC OF THE PHILIPPINES)
QUEZON CITY, METRO MANILA)S.S.

I, Dr. Pacifico Agabin, being of lawful age and being duly sworn upon my oath, do state as follows:

1. My name is Pacifico Agabin. I am a citizen of the Republic of the Philippines and a member of the Philippine Bar.

2. I am currently employed as Dean of the College of Law at the University of the Philippines in Manila. I have been engaged in the practice of law in the Philippines since my graduation from Yale Law School in 1965. My employment and educational credentials are attached as Exhibit "A" to this affidavit.

3. Under Philippine law, moving and storage companies are required to hold a Certificate of Public Convenience and are regulated under section 16 of the Philippine Public Service Act. (Attached as Exhibit "B").

a. The Public Service Act created a regulatory agency, the Public Service Commission, which has been broken down into three regulatory bodies. One of those bodies, the Land Transportation Franchising and Regulatory Board (hereinafter "LTFRB"), governs moving and storage companies.

b. Under the Public Service Act, the LTFRB has primary jurisdiction over the facets of Philippine law with reference to activities by certain holders of certificates of public convenience, including moving and storage companies.

c. Sections 16 and 20 of the Public Service Act allow for collective rate-setting among public service corporations where such rates are filed with the LTFRB.

d. A necessary prerequisite to the filing of joint rates is the ability to meet and discuss the possibility of coming to such a determination. As a result, the mere act of meeting and discussing whether it would be beneficial to collectively set rates is not prohibited under the Public Service Act, and, in fact, is expected.

4. In addition to the governing provisions of the Public Service Act, moving and storage companies are also subject to Article 186 of the Philippine Revised Penal Code. (Attached as Exhibit "C")

a. Under Art. 186, monopolies and combinations in restraint of trade are prohibited and are classified as felonies. To be criminally liable under Art. 186, one must act with specific intent, or by "dolo". The absence of criminal intent is a defense to a "dolo" crime. Furthermore, for a corporate officer to be liable under Art. 186, the officer must have "knowingly permitted" or "failed to prevent" the conspiracy to create a prohibited combination

law and knowledge that such acts are in violation of the law in order to commit a dolo felony under this provision.

5. The regulatory agencies of the government have adopted a policy of trade protection and promotion of the traditional natural monopolies, like transportation, telecommunications, shipping, power distribution, and others through franchising and licensing scheme. Regulatory legislation with a view to maximizing efficiency and fostering public welfare has, in effect, impinged upon the Philippine laws on antitrust. As a result, such legislation has rendered the regulatory agencies so indifferent to antitrust laws that no case involving Art. 186 has ever reached the Supreme Court. The Third World economic status of the Philippine business environment further explains the regulatory scheme and the dearth of antitrust prosecutions.

a. The governmental body charged with the function of implementing Art. 186 has claimed that, aside from the psychological burden it would impose on investments, prosecutions for antitrust violations would effectively prevent the establishment of necessary industries, which in turn would lead to economic stagnation.

b. Art. 186, therefore, is subject to various exceptions from a blanket prohibition against restraints of trade. "By their very nature, certain public services or public utilities, such as those which supply water, electricity, transportation, telegraph, etc. must be given exclusive franchises if public interest is to be served. Such exclusive franchises are not violative of the law against monopolies." Anglo-Fil Trading Corporation v. Lazaro, 124 SCRA 494, 522 (1983).

c. Consistent with the above policies, the following examples demonstrate instances where government intervention in the economy has replaced competition:

i. In 1981, the Philippine Government organized a consortium of the 23 biggest Filipino contractors into a private contracting company called Filipino Contractors International Corporation (FCIC) in order to enhance the consortium's financial capability and its ability to compete in the international construction market.

ii. In 1975, the Philippine Government organized all sugar planters, millers, and traders in the Philippines by means of a law, Presidential Decree No. 775, creating the Philippine Sugar Commission, to act as a single buying and selling agency of sugar, and one of its functions was "to determine the floor-ceiling price of sugar" (Section 1[d], P.D. 775).

iii. In 1983, transportation cooperatives composed of small operators of common carriers were reorganized by executive fiat, Executive Order No. 898, into a Committee On Transportation Cooperatives and made a public office under the Ministry of Transportation And Communications "to

transportation". These land, sea and air transportation cooperatives have been recognized by law under the recently enacted Cooperative Code Of The Philippines, Republic Act 6938, approved March 30, 1990.

iv. The Maritime Industry Authority (MARINA) approves passage and freight rates proposed by the Conference of Inter-Island Ship Owners and Operators (CISO) (Memo Circular No. 57, November 22, 1990).

v. Price ceilings were set for prime commodities by legislation, like rice, milk, sugar, pork, chicken, flour, cooking oil, kerosene, and petroleum gas (Executive Order No. 423, October 4, 1990), and guidelines for imposing price ceilings on certain prime commodities in the National Capital Region (NCR) were laid down by administrative order (AO No. 10, October 8, 1990).

vi. The processing, blending, repacking, and marketing of lubricating oils, process oils, specialty oils, basestocks, recycled oils, used oils, blended fuel oils and emulsified petroleum oils is regulated and licensed by the Energy Regulatory Board (Rules And Regulations Of ERB, re-issued on March 19, 1990).

vii. Even minimum wages are mandated by administrative fiat, for example, see the schedule of minimum wages setting the minimum wage at One Hundred Six Pesos (P106.00) per day for non-agricultural workers (Wage Order No. NCR-01-A, October 30, 1990).

6. Under the terms of the agreements on United States military facilities in Philippine military bases, U.S. jurisdiction is limited to criminal and disciplinary matters over "persons subject to the military law of the United States."

Article XIII (4) makes clear that:

The foregoing provisions of this article shall not imply any right for the military authorities of the United States to exercise jurisdiction over persons who are nationals of or ordinarily resident in the Republic of the Philippines, unless they are members of the United States armed forces.

Philippine jurisdiction is otherwise exercised over acts and transactions occurring at the Subic and Clark Philippine military bases.

as Exhibit "D"), for instance, reaffirm Philippine sovereignty over Clark and Subic Bases and their extensions, stating that the bases are Philippine bases under the command of the Philippine base commanders. In addition, the arrangements regarding the delineation of U.S. facilities at Clark Air Base and Subic Naval Base and on the powers and responsibilities of the Philippine base commanders and related powers and responsibilities of the U.S. facility commanders expressly provide that "[i]n the performance of their duties the Base Commanders and the United States Commanders shall be guided by full respect for Philippine sovereignty on the one hand and the assurances of unhampered United States military operations on the other." (para. 11)

b. Philippine law is directly applied to private contractors engaging in business at the bases. For example, the agreement between the governments of the two countries relating to the employment of Philippine nationals in the bases dated May 27, 1968 provide that: "Contractors and concessionaires performing work for the U.S. Armed Forces in the Philippines shall be required by their contract or concession agreements to comply with all applicable Philippine labor laws and regulations. (Art. IV, para. 1) The agreed minutes to this agreement further clarify that "it shall be the responsibility of Philippine authorities to determine whether contractors and concessionaires performing work for the U.S. Armed Forces in the Philippines comply with Philippine labor laws and regulations and to enforce compliance with such laws and regulations."

c. The 1983 Philippines-US Military Base Agreement Review Memorandum of Agreement expressly provides, under the heading of "Respect for Philippine Law," that "it is the duty of members of the United States forces, the civilian component, and their dependents, to respect the laws of the Republic of the Philippines and to abstain from any activity inconsistent with the spirit of the Military Bases Agreement and, in particular, from any political activity in the Philippines."

d. The above demonstrates that the United States has only limited jurisdiction under the Military Bases Agreement. The prosecution of the Indictment in the case of United States v. Tumor International, Inc., et. al. is a rejection of the special recognition of Philippine sovereignty guaranteed by both the letter and the spirit of the Military Bases Agreement.

FURTHER AFFIANT SAITH NAUGHT


DR. PACIFICO AGABIN

SUBSCRIBED AND SWORN to before me this 14 day of
November 1992, Affiant exhibiting to me his Residence
Certificate No. 13014985 L issued at Marikina, Metro Manila,
on 21 January 1992.

Doc. No.

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Page No.

172

Book No.

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[Signature]

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